

Courts and Crimes Legislation Further Amendment Act 2010 No 135

[2010-135]



New South Wales

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

Amending Acts and amending provisions are subject to automatic repeal pursuant to sec 30C of the [Interpretation Act 1987 No 15](#) once the amendments have taken effect.

Authorisation

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Courts and Crimes Legislation Further Amendment Act 2010 No 135



New South Wales

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Courts and Crimes Legislation Further Amendment Act 2010 No 135



New South Wales

An Act to amend various Acts with respect to courts, crimes, evidence, criminal and civil procedure, victims compensation and other matters.

1 Name of Act

This Act is the *Courts and Crimes Legislation Further Amendment Act 2010*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) The following provisions commence on the dates indicated:
 - (a) Schedule 4—25 February 2011 or such earlier day as may be appointed by proclamation,
 - (b) Schedules 6.1, 6.2, 6.4, 14 [1] and 18—a day or days to be appointed by proclamation,
 - (c) Schedule 12.2 [2]—14 January 2011,
 - (d) Schedule 14 [2]—the date of assent to this Act, or the date of commencement of Schedule 1 [2] to the *Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Act 2009*, whichever is the later.

Schedules 1-5 (Repealed)

Schedule 6 Amendment of *Civil Procedure Act 2005 No 28*

6.1 Amendment of *Civil Procedure Act 2005 No 28* relating to representative actions

[1] Section 4 Application of Parts 3-10

Insert after section 4 (1):

(1A) Part 10 applies in relation to civil proceedings in the Supreme Court.

[2] Part 10

Insert after section 154:

Part 10 Representative proceedings in Supreme Court

Division 1 Preliminary

155 Definitions (cf s33A FCA)

In this Part:

Court means the Supreme Court.

defendant means a person against whom relief is sought in representative proceedings.

group member means a member of a group of persons on whose behalf representative proceedings have been commenced.

proceedings means proceedings in the Court other than criminal proceedings.

representative party means a person who commences representative proceedings.

representative proceedings—see section 157.

sub-group member means a person included in a sub-group established under section 168.

sub-group representative party means a person appointed to be a sub-group representative party under section 168.

Note—

For the purposes of comparison, a number of provisions of this Part contain bracketed notes in headings drawing attention (“cf”) to equivalent or comparable (though not necessarily identical) provisions of Part IVA of the [Federal Court of Australia Act 1976](#) (“FCA”) of the Commonwealth as in force immediately before the commencement of this Part.

156 Application

This Part applies to proceedings commenced after the commencement of this section, whether the cause of action arose before or arises after that commencement.

Division 2 Commencement of representative proceedings

157 Commencement of representative proceedings (cf s33C FCA)

(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person, and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
- (c) the claims of all those persons give rise to a substantial common question of law or fact,

proceedings may be commenced by one or more of those persons as representing some or all of them.

(2) Representative proceedings may be commenced:

- (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief, or
 - (ii) consists of, or includes, damages, or
 - (iii) includes claims for damages that would require individual assessment, or
 - (iv) is the same for each person represented, and
- (b) whether or not the proceedings:
 - (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or
 - (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

158 Standing (cf s33D FCA)

- (1) For the purposes of section 157 (1) (a), a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person.
- (2) The person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.

(3) If a person has commenced representative proceedings, that person retains standing:

- (a) to continue the proceedings, and
 - (b) to bring an appeal from a judgment in the proceedings,
- even though the person ceases to have a claim against any defendant.

159 Is consent required to be a group member? (cf s33E FCA)

- (1) Subject to subsection (2), the consent of a person to be a group member is not required.
- (2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so:
 - (a) the Commonwealth, a State or a Territory,
 - (b) a Minister of the Commonwealth, a State or a Territory,
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association,
 - (d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

160 Persons under legal incapacity (cf s33F FCA)

- (1) It is not necessary for a person under legal incapacity to have a tutor merely in order to be a group member.
- (2) A group member who is a person under legal incapacity may only take a step in representative proceedings, or conduct part of the proceedings, by the member's tutor.

161 Originating process (cf s33H FCA)

- (1) The originating process in representative proceedings, or a document filed in support of the originating process, must, in addition to any other matters required to be included:
 - (a) describe or otherwise identify the group members to whom the proceedings relate, and
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed, and
 - (c) specify the question of law or facts common to the claims of the group

members.

- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

162 Right of group member to opt out (cf s33J FCA)

- (1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court.
- (2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.
- (3) The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.
- (4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.

163 Causes of action accruing after commencement of representative proceedings (cf s33K FCA)

- (1) The Court may at any stage of representative proceedings, on application by the representative party, give leave to amend the originating process commencing the representative proceedings so as to alter the description of the group.
- (2) The description of the group may be altered so as to include a person:
 - (a) whose cause of action accrued after the commencement of the representative proceedings but before such date as the Court fixes when giving leave, and
 - (b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceedings.
- (3) The date fixed under subsection (2) (a) may be the date on which leave is given or another date before or after that date.
- (4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceedings.

164 Situation where fewer than 7 group members (cf s33L FCA)

If, at any stage of representative proceedings, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

- (a) order that the proceedings continue under this Part, or
- (b) order that the proceedings no longer continue under this Part.

165 Distribution costs excessive (cf s33M FCA)

If:

- (a) the relief claimed in representative proceedings is or includes payment of money to group members (otherwise than in respect of costs), and
- (b) on application by the defendant, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts,

the Court may, by order:

- (c) direct that the proceedings no longer continue under this Part, or
- (d) stay the proceedings so far as it relates to relief of the kind mentioned in paragraph (a).

166 Court may order discontinuance of proceedings in certain circumstances (cf s33N FCA)

- (1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or
 - (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or
 - (c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or
 - (d) a representative party is not able to adequately represent the interests of the group members, or

- (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.
- (2) It is not, for the purposes of subsection (1) (e), inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings:
 - (a) do not include all persons on whose behalf those proceedings might have been brought, or
 - (b) are aggregated together for a particular purpose such as a litigation funding arrangement.
- (3) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
- (4) Leave for the purposes of subsection (3) may be granted subject to such conditions as to costs as the Court considers just.

167 Effect of discontinuance order under this Part (cf s33P FCA)

- (1) If the Court makes an order under section 164, 165 or 166 that proceedings no longer continue under this Part:
 - (a) the proceedings may be continued as proceedings by the representative party on the party's own behalf against the defendant, and
 - (b) on the application of a person who was a group member for the purposes of the proceedings, the Court may order that the person be joined as an applicant in the proceedings.
- (2) In this section:
applicant, in relation to proceedings, includes a claimant or plaintiff (as the case may be) in the proceedings.

168 Determination of questions where not all common (cf s33Q FCA)

- (1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions.
- (2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

169 Individual questions (cf s33R FCA)

- (1) In giving directions under section 168, the Court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to the claims of that member.
- (2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the question.

170 Directions relating to commencement of further proceedings (cf s33S FCA)

If a question cannot properly or conveniently be dealt with by the Court under section 168 or 169, the Court may give directions for the commencement and conduct of other proceedings, whether or not group proceedings.

171 Adequacy of representation (cf s33T FCA)

- (1) If, on application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and make such other orders as it thinks fit.
- (2) If, on application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

172 Stay of execution in certain circumstances (cf s33U FCA)

If a defendant in representative proceedings commences proceedings in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceedings until the other proceedings are determined.

173 Approval of Court required for settlement and discontinuance (cf s33V FCA)

- (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

174 Settlement of individual claim of representative party (cf s33W FCA)

- (1) A representative party may, with the leave of the Court, settle the party's

individual claim in whole or in part at any stage of the representative proceedings.

- (2) A representative party who is seeking leave to settle, or who has settled, the party's individual claim may, with the leave of the Court, withdraw as representative party.
- (3) If a person has sought leave to withdraw as representative party under subsection (2), the Court may, on application by a group member, make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.
- (4) Before granting a person leave to withdraw as a representative party:
 - (a) the Court must be satisfied that notice of the application has been given to group members in accordance with section 175 (1) and in sufficient time for them to apply to have another person substituted as the representative party, and
 - (b) any application for the substitution of another group member as a representative party must have been determined.

Division 3 Notices

175 Notice to be given of certain matters (cf s33X FCA)

- (1) Notice must be given to group members of the following matters in relation to representative proceedings:
 - (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162 (1),
 - (b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,
 - (c) an application by a representative party seeking leave to withdraw under section 174 as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the proceedings does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.
- (4) Unless the Court is satisfied that it is just to do so, an application for approval of

a settlement under section 173 must not be determined unless notice has been given to group members.

- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates.

176 Notices under section 175 (cf s33Y FCA)

- (1) The form and content of a notice under section 175 must be approved by the Court.
- (2) The Court must, by order, specify:
 - (a) who is to give the notice, and
 - (b) the way in which the notice is to be given.
- (3) An order under subsection (2) may also include provision:
 - (a) directing a party to provide information relevant to the giving of the notice, and
 - (b) relating to the costs of giving notice.
- (4) An order under subsection (2) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in any proceedings.

Division 4 Powers of the Court

177 Judgment—powers of the Court (cf s33Z FCA)

- (1) The Court may, in determining a matter in representative proceedings, do any

one or more of the following:

- (a) determine a question of law,
 - (b) determine a question of fact,
 - (c) make a declaration of liability,
 - (d) grant any equitable relief,
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies,
 - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.
- (3) Subject to section 173, the Court is not to make an award of damages under subsection (1) (f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to:
- (a) the manner in which a group member is to establish the member's entitlement to share in the damages, and
 - (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

178 Constitution etc of fund (cf s33ZA FCA)

- (1) Without limiting the operation of section 177 (2), in making provision for the distribution of money to group members, the Court may provide for:
- (a) the constitution and administration of a fund consisting of the money to be distributed, and
 - (b) either:
 - (i) the payment by the defendant of a fixed sum of money into the fund, or
 - (ii) the payment by the defendant into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members, and
 - (c) entitlements to interest earned on the money in the fund.

- (2) The costs of administering a fund are to be borne by the fund, or by the defendant in the representative proceedings, or by both, as the Court directs.
- (3) If the Court orders the constitution of a fund under subsection (1), the order must:
 - (a) require notice to be given to group members in such manner as is specified in the order, and
 - (b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to payment, and
 - (c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund, and
 - (d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.
- (4) The Court may allow a group member to make a claim after the day fixed under subsection (3) (c) if:
 - (a) the fund has not already been fully distributed or applied in accordance with an order under subsection (5), and
 - (b) it is just to do so.
- (5) On application by the defendant after the day fixed under subsection (3) (d), the Court may make such orders as it thinks fit for the payment from the fund to the defendant of the money remaining in the fund.

179 Effect of judgment (cf s 33ZB FCA)

A judgment given in representative proceedings:

- (a) must describe or otherwise identify the group members who will be affected by it, and
- (b) binds all such persons other than any person who has opted out of the proceedings under section 162.

Division 5 Appeals

180 Appeals (cf s 33ZC FCA)

- (1) The following appeals from a judgment of the Supreme Court in representative proceedings may (subject to the rules of court) themselves be brought in the

Court of Appeal under section 101 of the *Supreme Court Act 1970* as representative proceedings:

- (a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to questions common to the claims of group members,
 - (b) an appeal by a sub-group representative party on behalf of sub-group members in respect of judgment to the extent that it relates to questions common to the claims of sub-group members.
- (2) The parties to an appeal in respect of the determination of a question that relates only to the claim of an individual group member are that group member and the defendant.
- (3) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.
- (4) If an appeal is brought from the judgment of the Court in representative proceedings, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as it considers appropriate.
- (5) This Part (other than section 162) applies to any such appeal proceedings despite the provisions of any other Act or law.
- (6) The notice instituting an appeal in relation to questions that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

Division 6 Miscellaneous

181 Costs (cf s43 (1A) FCA)

Despite section 98, in any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by sections 168 and 169.

182 Suspension of limitation periods (cf s33ZE FCA)

- (1) On the commencement of any representative proceedings, the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended.
- (2) The limitation period does not begin to run again unless either the member opts

out of the proceedings under section 162 or the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.

- (3) However, nothing in this section affects the running of a limitation period in respect of a group member who, immediately before the commencement of the representative proceedings, was barred by the expiration of that period from commencing proceedings in the member's own right in respect of a claim in the representative proceedings.
- (4) This section applies despite anything in the [Limitation Act 1969](#) or any other law.

183 General power of Court to make orders (cf s33ZF FCA)

In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

184 Reimbursement of representative party's costs (cf s33ZJ FCA)

- (1) If the Court has made an award of damages in representative proceedings, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
- (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceedings by the person making the application are likely to exceed the costs recoverable by the person from the defendant, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.
- (3) On an application under this section, the Court may also make any other order that it thinks just.

[3] Schedule 6 Savings, transitional and other provisions

Insert at the end of the Schedule (with appropriate Part and clause numbering):

Part Provisions consequent on enactment of Schedule 6.1 to [Courts and Crimes Legislation Further Amendment Act 2010](#)

Effect of enactment of Part 10 on existing proceedings

- (1) Except as provided by this clause or the regulations, nothing in the new Part affects the commencement or continuance of any action or proceedings of a

representative character commenced otherwise than under the new Part before the commencement of that Part.

- (2) Subject to subclause (3), the new Part extends to proceedings commenced (but not finally determined) in the relevant court under Division 2 of Part 7 of the uniform rules before the commencement of that Part.
- (3) The relevant court may make such orders dispensing with or modifying the requirements of the new Part in relation to proceedings referred to in subclause (2) as the relevant court thinks appropriate or necessary to ensure that justice is done in the proceedings.
- (4) In this clause:

relevant court, in relation to actions or proceedings referred to in subclause (1), means the court or tribunal in which the action or proceedings commenced.

the new Part means Part 10 (as inserted by the [Courts and Crimes Legislation Further Amendment Act 2010](#)).

6.2 Amendment of **Civil Procedure Act 2005 No 28** relating to dispute resolution

[1] Section 3 Definitions

Insert in section 3 (1) in alphabetical order:

civil dispute has the same meaning as it has in Part 2A.

[2] Part 2A

Insert after Part 2:

Part 2A Steps to be taken before the commencement of proceedings

Division 1 Preliminary

18A Interpretation

- (1) In this Part:

alternative dispute resolution means processes (other than a judicial determination) in which an impartial person assists persons in dispute to resolve or narrow the issues in dispute, including (but not limited to) the following:

- (a) mediation (whether or not by a referral under this Act),
- (b) expert determination,
- (c) early neutral evaluation,
- (d) conciliation,
- (e) arbitration (whether or not by a referral under this Act).

civil dispute means a dispute that may result in the commencement of civil proceedings.

costs, in relation to compliance with the pre-litigation requirements, means costs payable in or in relation to complying with the requirements, and includes fees, disbursements, expenses and remuneration.

dispute resolution statement means a statement filed under Division 3.

mediation means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

pre-litigation protocol—see section 18C.

pre-litigation requirements means the requirements set out in section 18E.

- (2) In the event of an inconsistency between a provision of regulations made under this Part and a provision of any rules of court made under this Part, the provision in the regulations prevails to the extent of the inconsistency.
- (3) Any provision of this Part that enables or provides for rules of court to be made in relation to a matter operates, in relation to a particular court, to confer power on the rule committee for the court to make local rules in relation to the matter under the Act that constitutes the court.
- (4) Nothing in subsection (3) limits the operation of section 11 (Relationship between uniform rules and local rules).
- (5) If costs of compliance with the pre-litigation requirements are awarded or taken into account in civil proceedings in accordance with a provision of this Part, those costs are to be treated as if they formed part of the costs of the proceedings and the amount of costs payable may be assessed accordingly.

18B Application of Part

- (1) This Part applies in relation to civil disputes and civil proceedings other than excluded disputes or excluded proceedings.

(2) Each of the following is an **excluded dispute**:

- (a) any civil dispute where a person is in dispute with another person who is the subject of a vexatious proceedings order under the [Vexatious Proceedings Act 2008](#),
- (b) any civil dispute (other than a civil dispute referred to in paragraph (a) or (c)) that involves claims that may result in the commencement of excluded proceedings if the issues in dispute are not resolved or narrowed,
- (c) such other civil disputes (or civil disputes belonging to a class of civil disputes) that are declared under subsection (4) (a) or (5) to be excluded disputes.

(3) Each of the following are **excluded proceedings**:

- (a) any civil proceedings that result from a civil dispute referred to in subsection (2) (a) or (c),
- (b) any civil proceedings in the Dust Diseases Tribunal,
- (c) any civil proceedings in the Industrial Relations Commission, including the Commission in Court Session (the Industrial Court),
- (d) any civil proceedings in relation to the payment of workers compensation,
- (e) any civil proceedings in relation to the enforcement of a farm mortgage to which the [Farm Debt Mediation Act 1994](#) applies,
- (f) any civil proceedings in relation to a claim to which the [Motor Accidents Act 1988](#) or the [Motor Accidents Compensation Act 1999](#) applies,
- (g) any civil proceedings in relation to a claim made under the [Motor Accidents \(Lifetime Care and Support\) Act 2006](#),
- (h) any civil proceedings in which a civil penalty under a civil penalty provision (however described) of or under an Act (including a Commonwealth Act) is sought,
- (i) any ex parte civil proceedings,
- (j) any appeal in civil proceedings,
- (k) such other civil proceedings (or civil proceedings belonging to a class of civil proceedings) that are declared under subsection (4) (a) or (5) to be excluded proceedings.

(4) The Governor may make regulations declaring that:

- (a) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part, or
- (b) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) that have been excluded by rules of court under subsection (5) are not to be treated as excluded disputes or excluded proceedings for the purposes of this Part.

Note—

See section 18A (2) in relation to the resolution of inconsistencies between regulations made by the Governor and rules of court.

- (5) Rules of court (including the uniform rules) may declare that specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part.

18C Pre-litigation protocols

- (1) A ***pre-litigation protocol*** is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements in their application to a specified class of civil disputes to which this Part applies.
- (2) Without limiting subsection (1), a pre-litigation protocol for a class of civil disputes may provide for any of the following matters:
 - (a) appropriate notification and communication steps,
 - (b) appropriate responses to notifications and communication steps,
 - (c) appropriate correspondence, information and documents for exchange between the persons involved in the dispute,
 - (d) appropriate negotiation and alternative dispute resolution options,
 - (e) appropriate procedures to be followed in relation to the gathering of evidence (including expert evidence).
- (3) The Governor may make regulations setting out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.
- (4) Rules of court (including the uniform rules) may also set out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.

Division 2 Pre-litigation requirements

18D Compliance with pre-litigation requirements prior to commencement of

civil proceedings

Each person involved in a civil dispute to which this Part applies is to comply with the pre-litigation requirements before the commencement of any civil proceedings in a court in relation to that dispute.

18E Pre-litigation requirements

- (1) Each person involved in a civil dispute to which this Part applies is to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol:
 - (a) to resolve the dispute by agreement, or
 - (b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.
- (2) For the purposes of this section, reasonable steps include (but are not limited to) the following:
 - (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (b) responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (c) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute,
 - (d) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes,
 - (e) taking part in alternative dispute resolution processes.
- (3) Each person involved in a civil dispute to which this Part applies is not to unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.
- (4) Nothing in this section requires a person to provide any correspondence, information or document that might tend to incriminate the person.

18F Protection and use of information and documents disclosed under pre-

litigation requirements

- (1) A person involved in a civil dispute to which this Part applies who receives any information or documents provided by another person involved in a civil dispute in accordance with the pre-litigation requirements (and not otherwise available to the recipient) is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with:
 - (a) the resolution of the civil dispute between the persons involved in the civil dispute, or
 - (b) any civil proceedings arising out of the civil dispute.
- (2) Despite subsection (1), a person involved in a civil dispute or a party to civil proceedings to which this Part applies may:
 - (a) agree in writing to the use of information or documents otherwise protected under subsection (1), or
 - (b) be released from the obligation imposed under subsection (1) by leave of the court.
- (3) A court may treat a failure to comply with the obligation under subsection (1) as a contempt of court if the court is satisfied that there was no lawful or reasonable excuse for the failure.
- (4) If documents exchanged in accordance with the pre-litigation requirements are permitted by this section to be used in civil proceedings arising from the dispute to which the requirements applied, those documents are to be obtained and admitted into evidence in accordance with the usual rules and procedures applicable in the court in relation to the obtaining and admission of documentary evidence.
- (5) Nothing in this section:
 - (a) limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in civil proceedings, or
 - (b) limits the operation of section 180 in relation to a mediation to which that section applies.

Division 3 Filing of dispute resolution statements by parties

to civil proceedings

18G Dispute resolution statement to be filed by plaintiff

- (1) A plaintiff who commences civil proceedings to which this Part applies is to file a dispute resolution statement at the time the originating process for the proceedings is filed.
- (2) A dispute resolution statement filed under subsection (1) is to specify:
 - (a) the steps that have been taken to try to resolve or narrow the issues in dispute between the plaintiff and the defendant in the proceedings, or
 - (b) the reasons why no such steps were taken, which may relate to (but are not limited to) the following:
 - (i) the urgency of the proceedings (including that the limitation period for the commencement of the proceedings is about to expire),
 - (ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

18H Dispute resolution statement to be filed by defendant

- (1) A defendant in civil proceedings to which this Part applies who has been served with a copy of a dispute resolution statement filed by the plaintiff is to file a dispute resolution statement at the time the defendant files a defence in the proceedings.
- (2) A dispute resolution statement filed under subsection (1) is to:
 - (a) state that the defendant agrees with the dispute resolution statement filed by the plaintiff, or
 - (b) if the defendant disagrees in whole or part with the dispute resolution statement filed by the plaintiff—specify the respect in which, and reasons why, the defendant disagrees and specify other reasonable steps that the defendant believes could usefully be undertaken to resolve the dispute.

18I Dispute resolution statement to comply with uniform rules

A dispute resolution statement filed under this Division is to comply with such additional requirements as may be specified in rules of court (including the uniform rules).

Note—

See also section 17, which enables the Uniform Rules Committee to approve forms for documents to be used in connection with civil proceedings.

Division 4 Duties of legal practitioners

18J Duty of legal practitioners to provide certain information

- (1) A legal practitioner who is engaged to represent a person involved in a civil dispute to which this Part applies is to:
 - (a) inform the person about the applicability of the pre-litigation requirements to the dispute (including of the need to file a dispute resolution statement in relation to those requirements if civil proceedings are commenced), and
 - (b) advise the person about the alternatives to the commencement of civil proceedings (including alternative dispute resolution processes) that are reasonably available to the person in the circumstances in order to resolve or narrow the issues in dispute.
- (2) In determining whether a costs order should be made against a legal practitioner under section 99, a court may take into account a failure by the legal practitioner to comply with subsection (1).

Division 5 Consequences of non-compliance with this Part

18K Failure to comply does not prevent commencement or affect validity of proceedings

- (1) Non-compliance with the pre-litigation requirements:
 - (a) does not (unless the court otherwise orders or the uniform rules otherwise provide) prevent or preclude a person from commencing civil proceedings in a court, or
 - (b) does not invalidate civil proceedings that have otherwise been duly commenced.
- (2) A failure to file a dispute resolution statement in civil proceedings to which this Part applies does not invalidate the originating process commencing the proceedings, a response to such a process or the proceedings if they have otherwise been duly filed or commenced.

18L Persons generally to bear own costs of compliance with pre-litigation requirements

Subject to this Division, each person involved in a civil dispute (or each party to civil proceedings) to which this Part applies is to bear that person's or party's own costs of compliance with the pre-litigation requirements, unless rules of court (including the uniform rules) otherwise provide.

18M Court may make orders as to costs of compliance with pre-litigation

requirements

- (1) Despite section 18L, a court may:
 - (a) order that a party to civil proceedings to which this Part applies pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so, having regard to the overriding purpose of this Act, and
 - (b) make a costs order under section 99 against a legal practitioner and, in determining whether such an order should be made, the court may take into account any conduct by the legal practitioner that causes a party to civil proceedings to which this Part applies not to comply with the pre-litigation requirements.
- (2) A court may make an order under subsection (1) (a) of its own motion or on the application of a party to the civil proceedings.

18N Court may take failure to comply with pre-litigation requirements into account

- (1) If a court is satisfied that a party to civil proceedings to which this Part applies has failed to comply with the pre-litigation requirements, the court may take into account that failure:
 - (a) in determining costs in the proceeding generally, and
 - (b) in making any order about the procedural obligations of parties to proceedings, and
 - (c) in making any other order it considers appropriate.
- (2) In determining whether to take into account a failure to comply with the pre-litigation requirements, the court may have regard to any of the following matters:
 - (a) whether or not the persons in dispute were legally represented,
 - (b) whether or not compliance might have resulted in self-incrimination by a person in dispute,
 - (c) any reasons that have been provided for the failure by the persons in dispute,
 - (d) any other matter that the court considers relevant.
- (3) A court may make an order under subsection (1) of its own motion or on the application of a party to the civil proceedings.

Division 6 Miscellaneous

180 Disclosure and publication of information concerning mediation undertaken for the purposes of this Part

(1) In this section:

mediation means a meeting arranged for the mediation of a civil dispute to which this Part applies, and includes any steps taken in the course of making arrangements for the meeting or in the course of the follow-up of a meeting.

(2) The following provisions apply in relation to a mediation:

- (a) evidence of anything said or of any admission made in the mediation is not admissible in any proceedings before any court or other body,
- (b) a document prepared for the purposes of, or in the course of, or as a result of, the mediation, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.

(3) Subsection (2) does not apply with respect to any evidence or document if:

- (a) the persons in attendance at, or identified during, the mediation and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
- (b) the evidence is called to prove that an agreement or other arrangement has been reached as a result of a mediation and the substance of the agreement or arrangement.

(4) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:

- (a) a mediation, or
- (b) a document or other material sent to or produced to a mediator for the purpose of enabling a mediation to be arranged.

(5) The privilege conferred by subsection (4) extends only to a publication made:

- (a) at a mediation, or
- (b) in a document or other material sent to or produced to a mediator for the purpose of enabling a mediation to be arranged.

[3] Section 56 Overriding purpose

Omit “civil proceedings” and “the proceedings” from section 56 (1).

Insert instead “a civil dispute or civil proceedings” and “the dispute or proceedings”, respectively.

[4] Section 56 (3A)

Insert after section 56 (3):

- (3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.

[5] Section 56 (4)

Omit the subsection. Insert instead:

- (4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):
- (a) any solicitor or barrister representing the party in the dispute or proceedings,
 - (b) any person with a relevant interest in the proceedings commenced by the party.

[6] Section 56 (5)

Insert “, (3A)” after “(3)”.

[7] Section 56 (6) and (7)

Insert after section 56 (5):

- (6) For the purposes of this section, a person has a **relevant interest** in civil proceedings if the person:
- (a) provides financial assistance or other assistance to any party to the proceedings, and
 - (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note—

Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

- (7) In this section:

party to a civil dispute means a person who is involved in the dispute.

[8] Schedule 3 Rule-making powers

Insert after clause 34:

- 35 The pre-litigation requirements under Part 2A (including the practice and procedure relating to the pre-litigation requirements).
- 36 Pre-litigation requirements other than those under Part 2A (including specific protocols for civil proceedings or classes of civil proceedings).

[9] Schedule 6

Insert at the end of the Schedule (with appropriate Part and clause numbering):

**Part Provisions consequent on enactment of Schedule 6.2
to [Courts and Crimes Legislation Further Amendment Act 2010](#)**

Application of Part 2A

- (1) Part 2A (as inserted by the [Courts and Crimes Legislation Further Amendment Act 2010](#)) extends to civil proceedings commenced on or after the commencement of that Part in relation to civil disputes arising before that commencement, but only if the proceedings are commenced after the expiry of the transitional period.
- (2) In this clause:
- transitional period*** means the period:
- (a) commencing on the day on which Part 2A commences, and
 - (b) ending at the end of the day that is 6 months after the day on which Part 2A commences.

6.3

(Repealed)

6.4 Amendment of [Uniform Civil Procedure Rules 2005](#)

Rules 7.4 and 7.5 of the [Uniform Civil Procedure Rules 2005](#) are repealed.

Schedules 7-13 (Repealed)

Schedule 14 Amendment of [Industrial Relations Act 1996 No 17](#)

[1] Section 162C

Insert after section 162B:

162C Exercise of certain functions under federal Act by Commissioner

- (1) A Commissioner who is an Australian lawyer may exercise any function of the Commission in Court Session in respect of small claims proceedings.
- (2) If the Commissioner gives a direction, makes an order or does any other thing in relation to small claims proceedings, the Commission in Court Session may, on application by a party to the proceedings:
 - (a) review the direction, order or action, and
 - (b) by order confirm, vary or discharge the direction or order or take such other action as it thinks fit.
- (3) In this section:

small claims proceedings means proceedings dealt with as small claims proceedings under section 548 of the [Fair Work Act 2009](#) of the Commonwealth.

[2] Section 364 Definitions (as amended by [Industrial Relations Further Amendment \(Jurisdiction of Industrial Relations Commission\) Act 2009](#))

Insert “the Commission constituted by” before “a Commissioner who is an Australian lawyer” in paragraph (a1) in the definition of ***industrial court*** in section 364 (1).

Schedules 15-19 (Repealed)